



# Improving Expert Witness Credibility in the Eyes of the Jury

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It comes as no surprise that when a witness is perceived as being credible, their messages will be more persuasive to the jury. Much academic research has been conducted to determine the primary characteristics that measure credibility. There has even been a scale developed to measure the perceived credibility of an expert witness via four key factors<sup>1</sup>.

For evaluating an expert, the credibility factors are knowledge, confidence, trustworthiness, and likability. If any of these four are compromised (e.g., perceived lack of confidence, appears unknowledgeable), then that expert will receive low credibility ratings. The perception of each of these factors is moderated by a variety of verbal, non-verbal, and behavioral cues, which we review below.

*In our 25+ years of conducting jury research and participating in jury trials, we have had the opportunity to interview countless numbers of jurors after actual trials and mock trials. The feedback we have received between these two venues is virtually the same. Therefore, when we refer to jurors' feedback here, we will be focusing on the totality of comments.*

## How Do Jurors View the Role of an Expert Witness?

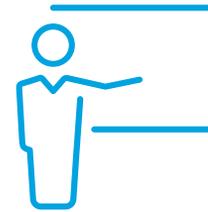
### Jurors Filter Evidence Through Experiences

When faced with two competing stories from two parties entangled in a lawsuit, jurors try to simplify the evidence to determine which version of the story makes sense within their own understanding and perception of the world. Thus, jurors will filter the evidence through their personal experiences and attitudes they have formed over the years as a result of their culture, experiences, and upbringing.

Not only do jurors filter the case evidence through their sensibilities, but they also do the same for expert witness testimony to decide which is more persuasive (in addition to assessing credibility based on factors detailed below). Therefore, the expert with the message that best aligns with the juror's attitudes and experiences will have their testimony assimilated into that juror's version of what happened. Information that is not consistent with their personal sensibilities is often ignored and not absorbed.

### **Jurors Expect Experts to Be Teachers**

Jurors see an expert as someone who clearly and concisely provides information necessary to assist them in evaluating the merits of the case. Neal (2009) tells us, "Expert witnesses are retained to take the stand and share specialized knowledge with the court—specialized knowledge that may help the trier of fact make the decision they are charged to make."<sup>2</sup> Particularly in a case with a subject area that is foreign and/or complex to jurors (such as patents or technology), jurors look to the expert to step into the role of professor and succinctly explain the technical concepts in a way they can understand. When an expert fails at this one specific goal, then their testimony is ineffective and lost with the jurors.



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When we have asked jurors about their view of the plaintiff or defense expert witnesses, virtually their first reaction is the fact that the experts were paid for their opinions. In particular, those making a high hourly rate or a large flat fee for their time in court are often seen as biased. Most attorneys think that since both sides' experts are paid, it will cancel each other out. However, in most cases, it does not.

Instead, in a juror's ideal trial courtroom, a neutral expert would testify and tell the jurors just what happened, making clear who was right and who was wrong. However, as we know, it cannot always work that way, so jurors are left to evaluate the evidence against their own attitudes, experiences, and reasoning.

### **Which Factors Do Jurors Consider When Evaluating Expert Credibility?**

The experts who tend to receive high credibility ratings among jurors have several clear qualities that distinguish them from the rest of the pack. Over the years, we have tested numerous fact and expert witnesses to learn which factors increase or decrease credibility. Jurors have also provided us with a concrete path to the factors that make an expert witness both effective and persuasive. Many of these findings are supported by academic research on witness credibility.

## Experience & Education

An attorney cannot underestimate the importance of on-point experience and advanced degrees for the subject matter at issue. For instance, having an experienced pulmonologist testify on causation for an asbestos or silica case is essential. Having an expert with the schooling and experience to opine about human factors issues, like warnings, helps the messages within their testimony be more believable and thus more persuasive.

However, not all expert witnesses need to have formal advanced degrees that result in numerous initials after their names. We have worked with and seen many effective experts who relied on their field experience to bolster credibility. Jurors like a witness who has worked their way up the professional ladder to achieve a prestigious position or has the hands-on experience needed to possess first-hand knowledge of the subject matter. Field experience can hold as much (or more) credibility as a formal degree with jurors.



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With this in mind, we have seen cross examination backfire when counsel attacks witnesses who lack a formal advanced degree but have extensive field experience. Jurors tend to view the experience-based expert as being like themselves; because the majority of jurors do not hold advanced degrees but do have years of experience in their jobs, they often hold a similarly situated expert in high regard.

## Personally Engage the Data

Time and time again, experts lose credibility because they fail to assess the data and research or even examine a plaintiff. An expert witness who has not personally engaged the materials and instead relied on research associates to run the analysis and write the report tends to be unsuccessful in persuading the members of the jury. Any witnesses—not just experts—who are hands-on with the data and analysis will command more believability. For instance, when evaluating an expert physician who was asked to opine about causation in a personal injury/products liability case, our research has repeatedly shown that jurors value the witness' testimony less when the doctor only reviews the medical records and never "lays hands on" or examines the plaintiff (assuming the plaintiff was still alive at the time the expert was hired). For the physician experts that do these things, the persuasiveness of their testimony is enhanced.

So how does an expert witness counter this criticism? It is important for experts who may not have personally run all the data analyses or completed the literature review to discuss how they supervised the research process, monitoring and approving all work done to their specifications. By providing the appearance that the expert was involved in and directed the process, that person can then take ownership of the analysis and report—thus regaining the credibility they would have otherwise lost.

## Source of Information

Another criticism that jurors have told us can adversely affect an expert's credibility is when they use information provided by attorneys as the foundation for their opinions and conclusions. In most cases, expert witnesses receive a "file" from the attorneys who have hired them. Similar to the previous issue of not personally engaging or taking ownership of the analysis, jurors are also critical of an expert who only relies on case details received from attorneys.

Jurors expect that the expert witness will engage in their own level of literature review and research; otherwise, they become suspicious of the conclusions drawn from such information. When this situation happens (and it does, more frequently than you might think), it reinforces jurors' beliefs that the expert not only has a biased opinion, but they are also being controlled by the attorneys who engaged them—thus giving meaning to the phrase "hired gun."

Now, you may be thinking that it is unavoidable to give an expert the litigation file relevant to the case; that is true. However, the factor that affects witness credibility comes in when the expert stops after receiving said file. While jurors expect the expert to be given files from the lawyers in the lawsuit, they also expect them to conduct additional work to verify that the file is complete and that they have the most current research to develop their opinion. Expert witness testimony based solely on the attorney-provided files tends to fall flat among jurors and become a strong cross examination topic.

## Demeanor

Jurors are attuned to an expert witness' tone of voice and are critical of those who sound arrogant or condescending. In one example involving a corporate research scientist, jurors noted that his tone of voice and the manner in which he spoke (e.g., proud to discuss his study, provided long-winded answers) made him come across as a "know-it-all," or as if he were "smarter than everyone else in the room." Another juror said, "He was so sure of what he knew, he knew more than anyone else." This expert's "arrogant" and "cocky" demeanor severely undercut any impression he might have made as a knowledgeable witness on the particular subject matter.



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As previewed earlier, experts who can channel their inner professor and easily explain complex subjects in accessible, understandable terms—without sounding condescending—will be more effective among jurors. Our post-verdict interviews with trial jurors have reinforced the notion that experts who believe credibility comes from technical jargon and complex explanations will not connect with the jurors and therefore not assist them in understanding case details.

Consistent with cognitive psychology (as we outlined earlier), information that does not line up with jurors' sensibility, attitudes, or experiences will be cast aside and ignored. Therefore, an expert witness who testifies with jargon and complexities is not only confusing the jury but is also failing in their main purpose—to clarify and teach the jurors about the subject matter at hand. To quote Einstein, "If you can't explain it simply, you don't understand it well enough."

We do caution experts who default to using technical jargon that jurors may perceive a simplified message as condescending or as if they are being "talked down to". Therefore, it is a balancing act to avoid being too technical but also too simple or demeaning. As such, experts need to use sufficient industry jargon to show their experience and knowledge while simplifying the technical language enough to be educational and establish credibility with the jury.

### Balanced Expert Resume

Another level of bias that undermines an expert's persuasiveness with jurors is the content of their curriculum vitae (CV). Certainly, education and experience play a significant role (as discussed above), but it is the expert witness' list of cases—and for whom the expert has testified—that can have a different level of impact.



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It should come as no surprise that experts who are consistently hired by the same side (e.g., only plaintiff or only defense) lack the standing to provide a "neutral" opinion. For instance, if an expert witness has only testified for plaintiffs, jurors are astute enough to realize their opinion is questionable. An expert who can say they have been hired in different cases over their career by plaintiffs and defendants will exhibit a stronger credibility rating among jurors.

Moreover, this effect is heightened when the expert can say they were approached by attorneys for one side in a lawsuit, and after reviewing the facts, they turned down the offer to be an expert in that case. The benefit here is derived from the fact that jurors believe if an expert has testified for both sides at any time and/or has turned down others to avoid compromising their ethics or reputation, then they "must really believe in this case." When an expert witness appears neutral about who hires them and won't compromise their reputation for the first attorney who knocks on the door, their ability to persuade jurors is enhanced.

### Hourly Rates

While jurors will never be entirely comfortable with the high hourly rates that expert witnesses are paid, it is possible to reduce—or perhaps even neutralize—the impact on jurors' credibility assessments. Certainly, trying to put the expert's hourly rate into context is one of the more effective ways to counter its influence on jurors.

That is, when preparing an expert for deposition testimony, one question to ask is how their hourly fee will be used or allocated. Learning this information may lead to a very helpful answer that puts the hourly wage in perspective.

For instance, for most experts, being asked to testify takes them away from work in their field, i.e., a medical practice. To the extent it is truthful, informing the jury that the money collected from expert witness work will be used to benefit patients in their clinic (able to do pro bono work), their practice (purchase new state-of-the-art equipment), or their business (helping people in some way) appeals to jurors' altruistic sides. However, if the impression is left that the expert is "lining their pockets" (as quoted by jurors), then the expert will appear biased—again reinforcing the "paid for hire" stereotype that most jurors hold of experts.

### **Non-Verbal & Verbal Characteristics**

Finally, the old standbys for evaluating witness credibility apply to experts as well. Many academic research studies have reinforced the findings we encounter in the real world with actual trial jurors. Characteristics such as good eye contact, avoiding verbose answers, engaging in powerful speech, and appearing likable can all impact the way jurors perceive the persuasiveness of expert witness testimony.



The four characteristics that impact and enhance an experts' credibility are knowledge, confidence, trustworthiness, and likability.

If experts do not have good eye contact or use powerless speech (language that is perceived as being unsure or lacks confidence, such as excessive politeness, hedges and hesitations, etc.), then they will be perceived as lacking in the essential four characteristics that impact and enhance an experts' credibility—knowledge, confidence, trustworthiness, and likability.

## **Using These Guidelines to Enhance Expert Credibility**

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There are clearly many variables that affect an expert witness' perceived credibility, but, with careful preparation, they can be addressed in a way that strengthens expert testimony and ensures it is well-received by the panel. Still, attorneys must work against the jury's preconceived notions about a retained expert's legitimacy, since jurors often believe they are "hired guns" who are paid a hefty hourly rate to give a biased opinion.

Trial teams and experts have an uphill battle to fight from the moment testimony begins, and, for the most part, expert witnesses will always walk a fine line between making it clear they have significant command of the material and not sounding condescending or arrogant to the jury. Each of the factors reviewed here affects this critical balance.

As mentioned, you should be cognizant of the expert witness' experience and education and the way it is portrayed to jurors. An expert does not always have to possess an advanced degree for their expertise to be perceived as legitimate by the jury. In fact, oftentimes, real-life experience outweighs a formal degree. Additionally, to enhance credibility, the expert should show jurors they have personally engaged the case data and performed outside research that stretches beyond the documents given to them by attorneys.

Moreover, it is important to be aware of the expert's experience since those with the most balanced resumes will be perceived as the most neutral. Finally, make sure the expert is employing helpful verbal and non-verbal characteristics, such as good eye contact and powerful speech, which will influence the persuasiveness of their testimony.

When engaging an expert witness, the attorney or trial consultant should pay close attention to all of these variables and be mindful of how each influences the expert's credibility. In the end, a well-prepared expert is one of the most effective tools in helping you secure a favorable verdict.

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## References

<sup>1</sup> Brodsky, S.L., Griffin, M.P., & Cramer, R.J. (2010). The Witness Credibility Scale: An Outcome Measure for Expert Witness Research. *Behavioral Sciences and the Law*, 28, 892-907.

<sup>2</sup> Neal, T. (2009, March). Expert Witness Preparation: What Does the Literature Tell Us? *The Jury Expert*, 44-54.

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